

FILED

JUN 15 2009

**Clerk, U.S. District and
Bankruptcy Courts**

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF COLUMBIA

NATIONAL BUSINESS AVIATION
ASSOCIATION, INC.
1200 18TH STREET, N.W., SUITE 400,
WASHINGTON, DC 20036,

Plaintiff,

V.

FEDERAL AVIATION ADMINISTRATION,
800 INDEPENDENCE AVENUE, S.W.,
WASHINGTON, DC 20591

Defendant,

Case: 1:09-cv-01089

Assigned To : Robertson, James

Assign. Date : 6/15/2009

Description: TRO/PI

COMPLAINT FOR TEMPORARY, PRELIMINARY AND PERMANENT INJUNCTIVE RELIEF

1. This reverse FOIA action seeks temporary, preliminary and permanent injunctive relief that certain information voluntarily submitted to defendant Federal Aviation Administration (“FAA”) by plaintiff National Business Aviation Association, Inc. (“NBAA”) is exempt from threatened disclosure under the Freedom of Information Act, 5 U.S.C. § 552(b)(4). By letter dated June 1, 2009, the FAA has advised plaintiff that “the FAA intends to release this information on June 16, 2009.”

2. Plaintiff, National Business Aviation Association, Inc. is a corporation organized under the Nonprofit Corporation Act of the District of Columbia with its principal place of business at 1200 18th Street, N.W., Suite 400, Washington, DC 20036. The NBAA represents more than 8,000 dues paying member companies and is the leading organization for companies

that rely on general aviation aircraft to help make their businesses more efficient, productive and successful. Among its many services, NBAA annually hosts the world's largest civil aviation tradeshow and administers the NBAA Block Aircraft Registration Request ("BARR") service on behalf of the FAA.

3. As explained more fully below, plaintiff voluntarily submitted to FAA the BARR records, now sought by a FOIA requester for a list of all requests to block the ability to track an aircraft or flight from ASDI and ETMS databases since January 1, 2000. FOIA Request 2009-1947. (Attached as Exhibit 1). The requester specifically told the FAA that "I believe that the best way to fulfill this request would be to provide an electronic copy of the Blocked Aircraft Registration Request database. The National Business Aviation Association says on its website that the NBAA administers the BARR (Blocked Aircraft Registration Request) database on behalf of the FAA".

4. By letter dated March 20, 2009, NBAA objected to the release of records, all of which were submitted by it, requested in FOIA Request 2009-1947. A copy of the March 20, 2009 letter is attached as Exhibit 2.

5. Defendant Federal Aviation Administration (FAA) currently holds the records, voluntarily submitted by plaintiff, and has indicated its intent to release these records on June 16, 2009 pursuant to FOIA Request 2009-1947. A copy of this FAA determination is attached as Exhibit 3. This notification letter constitutes final agency action that is subject to judicial review.

JURISDICTION AND VENUE

6. This Court has jurisdiction under 28 U.S.C. § 1331. This reverse FOIA action arises under the laws of the United States including the Administrative Procedure Act, 5 U.S.C. §§ 701 *et seq.* and the Freedom of Information Act, 5 U.S.C. § 552.

7. Venue is proper in this district under 28 U.S.C. § 1391(e).

BACKGROUND

8. NBAA voluntarily provided documents to the FAA under the NBAA Block Aircraft Registration Request (“BARR”) service. This is a service by which aircraft owners or operators with commercial privacy or security related commercial concerns can seek and receive exemptions to block real-time public availability of Aircraft Situation Display Industry (“ASDI”) data. This prevents competitors and others from monitoring on a real-time basis the current location of company planes participating in the BARR service.

9. The program, described more fully on the NBAA website, see attached Exhibit 4, works as follows. Owners or operators (generally NBAA members) submit a formal and verifiable BARR letter to NBAA, requesting that its ASDI data be barred from public dissemination with respect to real-time movements of specific aircraft. The BARR requestor may block the public dissemination of this data either within the FAA (which is the source for ASDI data) or via the commercial ASDI vendors that make these data available to third party commercial users. NBAA collects and forwards these BARR letters and provides a monthly list to FAA of airplane tail numbers to be blocked from public ASDI dissemination at the FAA source. The exclusive means for an aircraft operator to block access to real-time aircraft situation display data by its competitors, is through the BARR program administered by NBAA. FAA does not process individual ASDI block requests.

10. The history and reasons for the BARR program are summarized on the NBAA website (see Exhibit 4 at 1). NBAA member flight departments expressed increasing concerns about the protection of their passenger’s privacy and security as well as the protection of company proprietary information. This increased concern resulted from proliferation of ASDI vendors and vast improvements in technology since the late 1990s that made it much easier to obtain flight information about aircraft that were on the pre-2005 BARR list.. These concerns were not satisfied by the Vendor Code of Conduct developed by NBAA to address “operator concerns about industrial espionage”, security and safety. A primary result of this review in

2005 was the addition of a BARR option to block ASDI information at the FAA data source to restricts the use of real time flight tracking applications to monitor flights.

11. As the submitter of BARR data to FAA, NBAA does not, has never, and would not under any circumstance, furnish the BARR list to any member of the public. This would defeat the very purpose of the BARR program and violate NBAA duties to its members. Aircraft owners and operators submit BARR letters to NBAA with the understanding and expectation that these ASDI block requests will be strictly executed by NBAA pursuant to the instructions of the owners and operators.

THE D.C. CIRCUIT AUTHORITY THAT IS DISPOSITIVE

12. NBAA's submission of its BARR database list is a voluntary submission to the FAA. As such, it is non-disclosable under FOIA Exemption 4 as authoritatively construed by the en banc D.C. Circuit in *Critical Mass Energy Project v. NRC*, 975 F.2d 871 (D.C. Cir. 1992) (*en banc*). The *Critical Mass* test is a simple black letter rule: voluntarily provided information is deemed "confidential for purposes of Exemption 4 if it is of a kind that would customarily not be released to the public by the person from whom it was obtained." *Id.* at 879. Here, the submitter is NBAA and it does not customarily release this data to the public.

13. Instead of applying the *Critical Mass* test, the FAA purported to determine in its letter of June 1, 2009 that the NBAA list is not commercial and therefore the first prong of FOIA exemption 4 is not satisfied. The determination is arbitrary, capricious and violates D.C. Circuit authority. In this Circuit, the term "commercial" is to be given its ordinary meaning. That ordinary meaning includes, among other things, the commercial reasons for which NBAA gathers its BARR list for submission to the FAA and includes the commercial reasons of its members for using the NBAA to shield from competitors the real-time location of its planes. This plain meaning of the term commercial is confirmed by other courts which hold, rather obviously, that information is commercial if it relates to commerce, trade or profit. Put simply, Exemption 4 is not confined only to records that reveal basic commercial operations or relate solely to the income producing aspects of the business. The exemption as authoritatively

construed by the D.C. Circuit reaches more broadly and applies, *inter alia*, where as here the provider of the information has a commercial interest in the information submitted to the agency.

14. That plaintiff NBAA is a nonprofit organization is irrelevant to the FOIA commercial exemption 4 for its voluntarily submitted data. Indeed, in the dispositive *en banc* D.C. Circuit opinion in *Critical Mass Energy Project* it was the nonprofit organization's reports describing operations of its members' plants that were commercial information exempt from disclosure under FOIA.

FIRST CAUSE OF ACTION

15. Paragraphs 1-14 of this Complaint are incorporated by reference as if fully restated herein.

16. The denial of confidential status by FAA to the voluntarily submitted data of plaintiff NBAA is arbitrary and capricious, flatly wrong under the D.C. Circuit's authoritative test in the *en banc* decision of *Critical Mass Energy Project v. Nuclear Regulatory Commission*, 975 F.2d 871 (D.C. Cir. 1992) (*en banc*), and an abuse of discretion, in violation of the Administrative Procedure Act, 5 U.S.C. § 706.

17. The administrative record contains no evidence to support the FAA determination that the NBAA list is not voluntarily supplied commercial information. As such, it is entitled to full protection under Exemption 4 pursuant to the clear holding of the District of Columbia circuit in *Critical Mass Energy Project*. Moreover, the term "commercial" as used in the Act is to be given its ordinary meaning. Both NBAA and its members have commercial interest in this information, and the FAA's decision that their interests are somehow noncommercial lacks any evidence in this record.

18. Plaintiff is entitled as a matter of law to temporary, preliminary and permanent injunctive relief that its BARR lists, voluntarily submitted to the FAA, must be withheld from public dissemination.

19. Plaintiff has no adequate remedy at law.

20. Because the law in this Circuit has been so authoritatively determined by *en banc* decision establishing the black letter rule that information submitted to the FAA on a voluntary basis is categorically protected from disclosure under FOIA, as long as it is not customarily disclosed to the public by the submitter, plaintiff has an extraordinary likelihood of success on the merits.

21. Plaintiff and its members will be irreparably harmed by public release of the NBAA BARR list and the balance of hardships tilts heavily in their favor.

22. WHEREFORE, plaintiff requests that this Court:

1. enjoin, temporarily, preliminarily and permanently, FAA, its agents and employees from the threatened and imminent June 16, 2009 disclosure, or at any time in the future in response to FOIA Request 2009-1947, of plaintiff's BARR database lists voluntarily submitted to the FAA; and
2. grants such other and further relief as the Court in its discretion determines to be just.

Respectfully submitted,



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